BLEED THROUGH

IN THE
UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

No. 63-186-Civ-J-S

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND,

Plaintiff,

v.

USAFORM HAIL POOL, INC., a Florida corporation, U.S. & FOREIGN MANAGEMENT, LTD., a New York corporation, U.S. & FOREIGN MANAGEMENT, INC., a Florida corporation, BARBARA B. MURPHY, as receiver for each of said corporations.

Defendants.

Filed Jan. 14, 1974

ORDER

On August 2, 1973, this Court entered findings of fact, conclusions of law and a final judgment finally disposing of this case. Although the findings of fact and conclusions of law show on their face that copies were sent to counsel for all parties, it is a fact that neither plaintiff, defendants nor their respective counsel received notice of the entry of the final judgment until November 13, 1973. Upon learning that final judgment had been entered, defendants immediately filed a notice of appeal but the ordinary maximum time provided by Federal Rule of Appellate Procedure 4(a) for filing such notice had long since expired.

The same day they filed their notice of appeal defendants also filed a motion requesting (1) a new trial, (2) relief from judgment and (3) leave of court to file a belated notice of appeal. The Court will hereinafter deny the first and third motions but, in order to do justice, will grant the motion for relief from judgment and rescind the findings of fact, conclusions of law and final judgment, heretofore entered.

Rule 77(d) of the Federal Rules of Civil Procedure provides that "Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear, and shall make a note in the docket of the mailing". Nevertheless, no copy of the final judgment was received by any party or any counsel. Furthermore, in July 1973, counsel for defendants telephoned the Court to inquire if any ruling on the case had been made. Upon learning that it had not, he requested that the Court telephonically notify him when a ruling was made. The Court said that would be unnecessary because copies of the final judgment would be mailed by the Clerk's office as a matter of course.

Many unique circumstances justify the Court's action in granting the motion for relief from judgment in this case. For example: (1) the legal issues and factual background are complex, (2) nearly $1,000,000 is involved, (3) the cause has been in litigation for nearly 10 years, (4) the cause was under advisement for six months before the judgment was entered, (5) the failure of the Clerk or Court to notify litigants of the judgment, (6) the failure of all litigants to learn of the judgment during the allowable appeal time, and (7) the anticipation of an appeal by all litigants since the case has been before the Court of Appeals

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on two previous occasions. *Wolfsohn* v. *Hankin*, 376 U.S. 203 (1964); *Thompson* v. *Immigration and Naturalization Service*, 375 U.S. 384 (1964); *Harris Truck Lines, Inc.* v. *Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962); *Hill* v. *Hawes*, 320 U.S. 520 (1944).

It would be a sad commentary on our judicial system if strict adherence to the very formalities and rules established to insure justice were used to defeat justice.

> Throughout history men have had to suffer from legal systems which worshipped rigid formalities at the expense of justice . . . . Of course, any civilized system of judicial administration should have enough looseness in the joints to avert gross denials of a litigant's rights. . . I confess, however, that I am uncomfortable with the notion that courts exist to fashion and preserve rules inviolate instead of to apply those rules to do justice to litigants.

Berman v. *United States*, 378 U.S. 530, 537, (1964) (Black, J. dissenting).

In the instant cases equity and justice will best be served by vacating the earlier judgment and re-entering it today.

Rule 60(b) of the Federal Rules of Civil Procedure provides in pertinent part that:

> On motion and upon such terms as are just, the Court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (6) any other reason justifying relief from the operation of the judgment.

The Court finds that in this case the "unique circumstances" enumerated above justify relief from the operation of the final judgment. Although this Court is precluded by the provisions of Rule 4 of the Federal Rules of Appellate

Procedure from granting defendants a belated appeal, Rule 60 of the Federal Rules of Civil Procedure provides the the Court with authority, under the unique circumstances presented herein, to grant the motion for relief from judgment. While a district court should be very reticent to use Rule 60(b) F.R.C.P. in order to circumvent the time requirements of Rule 4 F.R.A.P., the unique circumstances of this case certainly provide necessary cause to do so now.

No case cited by plaintiff in opposing the motion contains so many factors militating in favor of granting relief from judgment as appear in this case. *Cf. Gulf-Tampa Drydock Company* v. *Virginia Trader,* 435 F. 2d 150 (5th Cir. 1970); *Lord* v. *Helmandollar,* 348 F. 2d 780 (D.C. Cir. 1965); *Shotkin* v. *Weksler,* 254 F. 2d 596 (5th Cir. 1958).

Therefore, it is

ORDERED:

1. Defendants' motion for relief from judgment, filed herein November 19, 1973, is hereby granted.

2. Findings of fact and conclusions of law, entered herein August 2, 1973, and final judgment, entered herein August 2, 1973, are hereby rescinded, vacated and set aside.

DONE AND ORDERED at Jacksonville, Florida, this 14th day of January, 1974.

s/ CHARLES R. SCOTT,
Judge

Copies to:

GEORGE STELLJES, JR., ESQUIRE
Post Office Box 447
Jacksonville, Florida, 32201

ELMER W. BEASLEY, ESQUIRE
880 Asylum Avenue
Hartford, Connecticut, 06105

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Post Office Box 191
Daytona Beach, Florida, 32015

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USAFORM HAIL POOL, INC., a Florida corporation, U.S. & FOREIGN MANAGEMENT, LTD., a New York corporation, U.S. & FOREIGN MANAGEMENT, INC., a Florida corporation, BARBARA B. MURPHY, as receiver for each of said corporations.

Defendants.

Filed Nov. 19, 1973 Jacksonville, Fla.

The Defendants, USAFORM HAIL POOL, INC., U. S. & FOREIGN MANAGEMENT, LTD., U. S. & FOREIGN MANAGEMENT, INC., and BARBARA B. MURPHY, as receiver for each of said Defendants, move the Court for relief in one of the following alternatives:

1. A new trial under Federal Rules of Civil Procedure Rule 59(a) (2) on grounds that the final judgment entered in this cause contains substantial errors in the application of existing law to the facts of this case, and is contrary to the law of the case established in this cause in prior proceedings.

2. Relief from the judgment under Rule 60(b)(6) on the grounds stated in paragraph 1 hereof and on the grounds that in the manner hereafter stated the Defendants have been prejudiced by the actions of the Clerk and the Court in failing to inform defendants of entry of the judgment and it should, therefore, be vacated; or

3. Allowance of the filing of a Notice of Appeal instanter, there being unique circumstances in this cause justifying the Court's extension of time beyond the 30 day period contained in Federal Rule of Appellate Procedure 4(a). A Notice of Appeal is submitted herewith.

Defendants respectfully request the Court's consideration of the Memorandum in support of this Motion submitted herewith.

COBB, COLE, SIGERSON, MCCOY, BELL & BOND

By W. WARREN COLE, JR.
444 North Beach Street
Post Office Box 191
Daytona Beach,
Florida 32015
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Memorandum, along with the Notice of Appeal and Motion have been served by mail to GEORGE STELLJES, JR., Esquire, Post Office Box 447, Jacksonville, Florida, 32201 and ELMER W. BEASLEY, Esquire, 880 Asylum Avenue, Hartford, Connecticut, 06105, this 19th day of November A.D., 1973.

W. WARREN COLE
Attorney

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Defendants.

Filed Nov. 19, 1973 Jacksonville, Fla.

NOTICE OF APPEAL

Notice is hereby given that Defendants, USAFORM HAIL POOL, INC., a Florida corporation, U.S. & FOREIGN MANAGEMENT, LTD., a New York corporation, U.S. & FOREIGN MANAGEMENT, INC., a Florida corporation; BARBARA B. MURPHY, as receiver for each of said corporations, hereby appeal to the United States Court of Appeals for the Fifth Circuit from the Final Judgment and the Findings of Fact and Conclusions of Law in support

thereof, entered in this action on the 2nd day of August, A.D., 1973.

COBB, COLE, SIGERSON, MCCOY, BELL & BOND

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